IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.505 OF 2004

Iftikhar Ahmed Khan ..Appellant.

V/s.

Smt.Kamala Pyarelal Prajapati & Anr. ..Respondents.

Mr.N.V.Walawalkar for appellant.

Mrs.Indu Prakash for respondent Nos.1 to 3.

Mr.K.K. Tated for respondent Nos.4 to 8.

CORAM : V.C.DAGA, J.

DATED : 17TH SEPTEMBER, 2004.

P.C. :-

. Heard rival parties. This appeal is directed against the order dated 23/6/2003 passed by the learned Judge of the City Civil Court, Bombay in Notice of Motion No.1434 of 2002 in S.C. Suit No. 3702 of 2002, whereby the Notice of Motion seeking interim relief came to be rejected holding that the plaintiff has prima facie failed to establish his title and, consequently, his legal rights and or possession over the suit property.

2. The factual matrix emerging from the plaint reveals that the plaintiff has filed a suit for mandatory injunction to exercise his right to use, occupy and possess the suit land and structure standing thereon, namely; the suit property referred to in the plaint and also prayed for permanent injunction in terms of the prayer clause in the plaint.

3. In para 1 of the plaint, the plaintiff has stated that he has been in occupation of the land since 1962. The age of the plaintiff in cause title of the suit is shown as 45 years. The suit was filed in the year 2002. If one calculates age of the plaintiff in the year 1962, taking into account the age of the plaintiff as 45 years in 2002 ,one has to conclude that in the year 1962, the plaintiff's age must not be more than four years. When this fact was highlighted by the counsel for the respondent during the course of hearing, the plaintiff was asked to file an affidavit to disclose on oath as to when actually he came in possession of the suit property and in what manner. Naturally, the plaintiff, trapped in a quandary, could not have filed an affidavit to say that he came in possession of the suit property at the age of four, as such, he has

filed an affidavit dated 17th September, 2004 stating that the suit land was in use and occupation of his father since his childhood. However, his affidavit is silent as to when he got possession of the suit property from his father. Not a single document is on record to suggest that at any time his father was in possession of the suit property. His father is in possession and occupation of the adjoining property but not the property in question.

4. With the above material on record, if one travels further through the plaint, one would find that the plaintiff has also placed reliance on the order of the Tahsildar dated 8th February, 1994 produced on record at page 31 of the paperbook, whereby the Tahsildar has assessed this property for non agricultural use showing it in the hands of the appellant-plaintiff since 1962. The said order further recites that the appellant herein has constructed one structure on the said property in 1962. Consequently, suit property came to be assessed for non-agricultural use.

5. The above order of the Tahsildar dated 8/2/1994 came to be cancelled by a subsequent order vide order dated 30/4/2002.

6. The abovesaid order dated 30/4/2002 cancelling the order of the Tahsildar dated 8/2/1994 again came to be challenged in appeal before the Additional District Deputy Collector, M.S.Bandra, Mumbai. The said appeal bearing No.ADC/Appeal-2172/ 2002 ultimately, came to be allowed on 30/11/2002 and the order dated 30/4/2002 came to be set aside.

7. Being aggrieved by the above order dated 30/11/2002 the land owner again challenged the above order in appeal before the Dy.Collector (Appeals) Mumbai Suburban District, Mumbai. The said appeal bearing No.C/LND/A-7/2003, after hearing the parties to the appeal, came to be allowed with the result the order dated 8/2/1994 again came to be set aside.

8. Mr.Walawalkar submits that now, the above order whereby the order of Tahsildar dated 8/2/2004 came to be set aside is a subject matter of challenge in the higher forum and proceedings are still pending. Be that as it may, perusal of the last two orders would unequivocally go to establish that as on date suit structures are not in existence. What is in existence, as on date, is merely an open land. This fact is not in dispute. Mr.Walawalkar appearing

for the appellant submits that though the structures have been demolished still the possession of the appellant on the open land exists. Hence injunction must follow.

9. As already stated hereinabove, the very basis of the claim for possession of the suit property has lost its ground in view of the subsequent affidavit dated 17th September, 2004 wherein appellant has stated that his father was in possession of the suit property; whereas in the suit, appellant has claimed to be in possession of the suit property since 1962. The case sought to be made out in the plaint prima facie appears to be false to the knowledge of the appellant himself. The affidavit dated 17/9/2004 sworn by the appellant himself states that his father was in possession of the property. When he came in possession is not on record. There is no evidence in this behalf. In my view, on the above backdrop, there seems is no substance in the appeal. The appeal is thus, dismissed in limini with no order as to costs.

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